Circuit Courts Do Strange Things with Chevron

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Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 115 Mich. L. Rev. (forthcoming 2017), available at SSRN.

Kent Barnett and Chris Walker begin this fascinating article by describing the *Chevron* doctrine and its history. In its landmark 1984 opinion in *Chevron v. NRDC*, the Supreme Court announced a new, seemingly more deferential doctrine that it instructed lower courts to apply when they review agency interpretations of the statutes they administer. The *Chevron* opinion is one of the most cited opinions in history. It has been cited in "nearly 15,000 judicial decisions and in over 17,000 law review articles and other secondary sources." (P. 2.)

Barnett and Walker agree with most scholars that the Supreme Court's "choice to apply *Chevron* deference, as opposed to a less-deferential doctrine or no deference at all, does not seem to affect the outcome of the case." (P. 4.) They note that the Supreme Court did not even mention *Chevron* in three-quarters of the cases in which it reviewed agency statutory interpretations during the twenty-two-year period immediately after it issued its opinion in *Chevron*. They then report the findings of their study—the largest empirical study of circuit court applications of *Chevron* ever undertaken. As they characterize the results of their study, what they call *Chevron* Regular seems quite different from *Chevron* Supreme.

Barnett and Walker read, analyzed, and coded 1330 opinions issued by circuit courts between 2003 and 2013. Their dozens of findings are surprising in many ways. I will discuss just the five that I found most surprising. First, "agency statutory interpretations were significantly more likely to prevail under *Chevron* deference (77.3%) than *Skidmore* deference (56.0%) or, especially, de novo review (38.5%)." (P. 5) (footnote omitted). Second, circuit courts upheld agency interpretations more frequently when they applied *Chevron* to interpretations adopted through informal means (78.4%) than to interpretations adopted in notice and comment rulemakings (74.2%). Third, when circuit courts applied *Chevron*, they upheld longstanding interpretations far more often (87.6%) than recent interpretations (74.5%) or changed interpretations (65.6%). Fourth, circuit courts varied greatly with respect to the proportion of cases in which they applied *Chevron* to agency statutory interpretations—from a high of 88.9% for the D.C. Circuit to a low of 60.7% for the Sixth Circuit. Fifth, circuit courts also varied greatly with respect to the proportion of cases in which they upheld agency statutory interpretations, albeit not with a high correlation between their rates of outcomes and their rates of invocation of *Chevron*. The First Circuit upheld interpretations most frequently (83.1%); the Ninth Circuit upheld interpretations least frequently (65.5%), while the D.C. Circuit was around the middle (72.6%).

Barnett and Walker are appropriately cautious in drawing inferences from their findings. Their findings raise far more questions than they answer. Here are just a few.

First, the findings are a major disappointment to those of us who initially saw in *Chevron* the potential for greater consistency and predictability in the process of judicial review of agency statutory interpretations. We have long been disappointed with the massive inconsistencies in the Supreme Court's approach to *Chevron*, but many of us believed (or at least hoped) that circuit courts were applying *Chevron* in a relatively consistent and predictable way. We were wrong. Circuit court

applications of *Chevron* are at least as inconsistent, unpredictable, and incoherent as Supreme Court applications of *Chevron*. Those findings raise the question of whether *Chevron* can, or should, continue to exist as a review doctrine.

Second, whatever *Chevron* means in circuit courts, the circuit court version differs from the Supreme Court version in many ways. The glaring inconsistencies between the Supreme Court's approach to *Chevron* and the approach (more accurately the *approaches*) of the circuit courts raise the question whether a doctrine can, or should, survive in circuit courts when it bears no relation to the version of the doctrine that exists in the Supreme Court.

Third, it is impossible to determine whether, or to what extent, circuit courts use *Chevron* as a review doctrine rather than as a tool in writing opinions. The findings of the Barnett and Walker study are consistent with a legal regime in which courts first decide a case based on some undisclosed reasoning process and then use *Chevron* as a means of rationalizing that decision. In fact, some of the findings are more consistent with the use of *Chevron* as an after-the-fact justification for decisions than as a framework for making decisions. Thus, for instance, the finding that circuit courts uphold interpretations adopted through informal means more frequently than interpretations adopted in notice and comment rulemakings if, but only if, the court cites *Chevron,* suggests to me that circuit courts are first using some other method to decide to uphold an interpretation adopted through an informal means and then citing *Chevron* to justify that decision.

Fourth, the findings tell us nothing coherent about the views of the circuit courts with respect to the important debate the Supreme Court began when it issued its opinions in *Mead, Christensen,* and *Barnhart*—when, if ever, a court should apply the *Chevron* doctrine and when, if ever, a court should apply the putatively less deferential *Skidmore* doctrine. The finding that circuit courts uphold agency actions much more frequently when they apply *Chevron* than when they apply *Skidmore* suggests that circuit courts agree with the Supreme Court's characterization of *Chevron* as more deferential than *Skidmore*. However, the finding that courts uphold longstanding interpretations far more frequently than recent or changed interpretations when they apply *Chevron* suggests strongly that courts actually use a decision-making framework like *Skidmore* and then cite *Chevron* when that method of decision-making yields a decision to uphold an agency interpretation of a statute. The *Skidmore* test identifies duration and consistency as important criteria in deciding whether to uphold an agency interpretation, while the Supreme Court has often said that neither duration nor consistency are important factors when a court applies *Chevron*.

Barnett and Walker have provided an extremely valuable database and set of findings, but they have created a situation in which they, and the rest of us, must do a tremendous amount of work to draw useful inferences from their pathbreaking study.

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